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Supreme Court of the United States

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No. 70-270

UNITED STATES OF AMERICA, APPELLEE,

versus

THOMAS LYNN PORTER, LARRY SPEARS AND ARTHUR FULLER, APPELLANTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. .....

UNITED STATES OF AMERICA, APRELLEE,

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THOMAS LYNN PORTER, LARRY SPEARS AND ARTHUR FULLER, APPELLANTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appellants pray that a Writ of Certiorari issue to reverse the Judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case of April 30, 1971.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, No. 14,205, 14,357 and 14,358 was decided April 30, 1971, and is reported at Page 29.

JURISDICTION

The Judgment of the United States District Court for the District of South Carolina was affirmed by the

United States Court of Appeals for the Fourth Circuit on April 30, 1971, and this Judgment is a final Judgment in this matter.

The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1254 (1), Appellants, having asserted below and are asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Did the Trial Court err in refusing to grant the Appellants a continuance?

II. Did the Trial Court err in refusing to suppress the electronic tape recording?

III. Did the Trial Court err in failing to suppress all evidence and testimony secured by the Government subsequent to February 7, 1969?

IV. Was the electronic tape recording admissible into evidence?

V. If the evidence was insufficient to sustained a conviction of the Appellant Fuller under the counts of the Indictment, would the counts of the Indictment fail as to the Appellants Porter and Spears?

VI. Did the Court err in admitting, over the objection of the Appellants, the testimony of expert witness Cross and did the Court further err in refusing to allow the introduction of a previous statement made by such witness, contradicting his testimony on the witness stand?

VII. Did the Trial Court err in calling to the jury's attention in the instructions at the conclusion of the trial, the fact that the Appellants had chosen not to testify?

STATEMENT OF THE CASE

Thomas Lynn Porter and Larry Spears were indicted along with Arthur Fuller and Clyde Troulias in a three (3) count Indictment originating from the Federal Grand Jury of Greenville, South Carolina. Porter and Spears were residents of Greenville, South Carolina and Fuller and Troulias were both residents of Birmingham, Alabama.

The first count of the Indictment charged the defendants with a conspiracy in prohibition of 18 U. S. C., Section 371. It being alleged that such conspiracy violated 18 U. S. C., Sections 1052, 1084 and 2. The second count charged the defendants each with violation of 18 U. S. C., Section 1952, and the third count charged a violation of 18 U. S. C., Section 1084. All of these counts concerned an alleged interstate transmission by telephonic communications of betting or wagers, or of securing or giving gambling information. Upon their arraignment, each of the defendants pled "Not Guilty".

Prior to the trial and within the time set by the Rules, Porter and Spears each filed a Motion for Discovery and Inspection. All pertinent requests concerned therein having been granted by the trial Judge and the information sought was divulged by the government except for one portion having to do with the reception of telephone calls by an F. B. I. agent on the Birmingham end of the alleged conspiracy. Subsequent to the hearing on the Motion for Discovery and Inspection, a lengthy Motion was made and a subsequent hearing held upon a request by these defendants to suppress certain evidence, including a tape recording seized from the defendant Spears in Greenville, South Carolina (Government Exhibit T-7) and allegedly containing a number of unidentified voices, along with a voice identified as belonging to the defendant Porter. All of the Motions made by these defendants to suppress this evidence upon various grounds were overruled by the trial

Judge. On the hearing on the Motion to Discover and upon the hearing of the Motion to Suppress and on two (2) subsequent occasions during the trial, a request was made by the defendants for a continuance to afford the defendants sufficient time and opportunity to have electronic interpretations and analysis made of the tape recording held by the government and later to be introduced as the most damaging evidence against the defendants.

The trial of the case was begun November 17, 1969, and continued through November 21, 1969. The defendants elected not to testify in their own behalf and at the conclusion of the government's case, these defendants moved for a Judgment of Acquittal and the motion was denied. The jury convicted the defendants Porter, Spears and Fuller on all counts and acquitted the defendant Troulias on all counts. Motion for Judgment of Acquittal was renewed and Motion in Arrest of Judgment and for a new trial were made and denied. The Court sentenced Porter to eighteen (18) months confinement on counts one (1) and three (3). These sentences to run concurrently and to two (2) years on count two (2). This sentence to run consecutively to the sentence given on the other two (2) counts, but with the added provision that execution of this sentence on count two (2) to be suspended and Porter placed on probation for three (3) years. Spears was sentenced to nine (9) months each on Counts one (1) and three (3) to run concurrently and to fifteen (15) months on count two (2) with the provision that this latter sentence would run consecutively to the sentence on counts one (1) and three (3) and that execution of the latter sentence be suspended and Spears placed on probation for three (3) years.

Within due time, Porter and Spears filed Notice of Appeal and the matter was decided by the United States Court of Appeals for the Fourth Circuit on April 30, 1971.

The Court's Order is attached to the Appendix in the present matter.

STATEMENT OF FACTS

Both defendants, Porter and Spears are, and have been for some time, residents of Greenville, South Carolina. The defendant Fuller, and his acquitted co-defendant Troulias were residents of Birmingham, Alabama, at all times charged in the Indictment.

On March 8, 1969, seven (7) F. B. I. Agents of the South Carolina Division, pursuant to a previously issued Search Warrant went to two (2) trailers in Greenville, South Carolina. There were several people in the trailer, one (1) of whom was the defendant Spears. The Search Warrant was served upon Spears, but the defendant Porter was neither on the premises, nor was he served with the Search Warrant. These agents conducted a thorough search of the two (2) trailers and seized a huge volume of items they considered to be evidence and proof needed to support an Indictment. These items individually totalled over seven hundred (700) in number. The seized items were slips, printed forms, betting sheets, papers, assorted allied items and, the most damaging of all, a tape recording sitting on a tape recorder in one of the trailers. This tape was not threaded, nor in a position to be played or to be used to record. It was merely sitting on the recorder. The tape was seized, but the recorder was not. The tape was later introduced on the trial of the matter (Exhibit T-7). There was approximately seventeen (17) individual voices and conversations on the tape. The playing time of which consumed about one (1) hour. Only the voices of Porter and Spears were identified by one (1) government witness (Tr., 586, 622, 628). There was no testimony going to show the date of the making of the tape, or to show whether or not it was recorded in its entirety on the same date. There was no testimony or evidence offered by the government to

show the facts as to the actual recording of the tape (Tr., 586). The government did introduce testimony going to show that a portion of the events discussed in the conversations recorded would have occurred on February 3, 1968 (Tr., 586). At no point during the trial of the case was there any showing that any of the conversations recorded were interstate telephone calls. There were approximately three hundred (300) individual references made to individual sporting events, some of which may have occurred in the time mentioned during the Indictment. The government, however, offered no proof as to the entire list of sporting events discussed on the tape, confining itself to what it considered to be pertinent dates and events.

The defendants considered this tape, if admitted, to be the most damaging single item of evidence. It was generally admitted throughout the trial that the proof of the interestate conspiracy rested for the great part, on the tape. At every possible opportunity, the defendants requested a reasonable length of time in which to analyze and examine the tape so that dial tones could be identified; sporting events and the dates of such events could be identified; voices could be identified; and the tape could be examined to see whether or not it had been made at one time, or if it had been edited or added to. It was considered to be absolutely vital to the defenses that a thorough and complete examination and analysis of the tape be made. The defendants considered that they would be deprived of their right to a fair trial if this time was not afforded them and that they would have insufficient opportunity to prepare a proper defense. These Motions for continuances were, four (4) times, denied and the tape was introduced without the defendants having an opportunity to properly examine the tape.

The same would hold true on the over seven hundred (700) other items seized under authority of the Search

Warrant. These items were in several medium-large cardboard boxes and required about two (2) hours to look through, without an opportunity to thoroughly examine and analyze.

Of paramount significance to the proof of the conspiracy was a conversation overheard in a public telephone booth in a pharmacy, either in or near Greenville, South Carolina. The government based its' case, and so alleged in the Indictment, that the conspiracy began on or about February 3, 1968, and continued thereafter up to and including March 8, 1969. All of the overt acts in the Indictment are based on the admittedly circumstantial evidence shown by telephone toll-cards, without proof or substance of calls, or the person receiving the call. The real outstanding exception is overt act number ten (10), which alleges that on February 7, 1969, the defendant Spears made a telephone call from the pharmacy in Greenville, South Carolina to Birmingham, Alabama, and was overheard receiving wagering information. The source of this latter information was F. B. I. Agent John N. McNamara, Jr., who followed Spears to a public telephone booth and eavesdropped on the conversation. Agent McNamara was not produced by the government, but several other F. B. I. Agents testified as to the eavesdropping (Motion to Suppress pages 49, 71, 81 and 85; Tr., 112). The government had mislead these defendants when it named the witnesses to be presented and gave the trial Judge a list of these witnesses to be used in questioning prospective jurors. Agent McNamara's name was included in this list (Tr., 42).

It was established that this telephone booth was of sturdy construction and had a door which closed to insure privacy (see defendants' exhibits A, B and C photographs). Another agent testified that Spears was in a booth of sturdy construction, engaged in a private conversation with the doors shut (Tr., 101). It was also established that

the agent who overheard the conversation was standing right next to the telephone booth (Tr., 106),

Included in the huge volume of physical evidence, introduced by the government were toll cards of Southern Bell Telephone and Telegraphs Company. These toll cards were maintained by the Greenville office and at the offices in the states involved. They purport to reflect calls from several public telephone booths in the Greenville area to telephones in Birmingham, Alabama. They are the type of record used commonly in computerized billing and consists of information punched onto a card, or marked on a card, by a long-distance operator (Tr., 205-206). There were approximately four hundred (400) toll tickets (Exhibits T-39, T-42) and according to the government's witness (an F. B. I. agent) who was permitted to interprete the information reflected by these toll tickets, these tickets purported to represent long-distance calls made from Greenville to Birmingham, from July of 1968 to February of 1969. It was admitted that these particular tickets reflected only a minor portion of the large volume of calls made from these identical public pay phones during the same period (Tr., 488, 733-735). Some seventy (70) odd of these calls were made to the telephone numbers at the residence of the defendant Fuller (Tr., 538-546), but it was admitted that none of these records reflected or established the identity of the person making the call or the recipient of the call (Tr., 738). In fact, it was admitted by the government's agent that there was no possible way to identify and that there was no evidence to show the identity of the party who received the telephone calls in the Birmingham area (Tr., 739). Likewise, the government's witness admitted that there was no evidence, or method of deducing the contents of any such conversation (Tr., 732-733, 739). Additionally, the F. B. I. agent admitted that there was no proof that the defendant Fuller, or either of the defendants

on the Birmingham end of the alleged conspiracy ever had a conversation with any one from Greenville on any telephonic communication (Tr, 739). The F. B. I. agent was extremely vague on the method of making the calls and could only approximate the time that the calls were made (Tr., 725). There was, in fact, never any evidence of any type that the defendant Fuller, or that the defendant Troulias ever talked to either Porter or Spears by long distance communication (Tr., 747). In order for the conspiracy to be completed and the overt acts established, it was the position of Porter and Spears that proof of the telephonic communication between these defendants in Greenville and the co-defendants in Birmingham, must be established. The government failed to prove and offered no testimony that anyone had ever placed a bet, had ever seen or heard Fuller involved in gambling and no witness offered testimony of ever having received betting information from Fuller. There was a total lack of proof of any physical meeting between either Fuller and Porter or Fuller and Spears. As a matter of fact, there was never any evidence introduced that Porter and Spears even knew the defendant Fuller.

REASONS FOR GRANTING THE WRIT

I. The Trial Court erred in refusing to grant the Appellants a continuance.

The Motion for a continuance was made on several different occasions. The first real Motion having been made at the time of the hearing of the Motion to Produce (Motion to Produce, page 35). It was made in more complete form several days later on the hearing on the Motion to Suppress (page 3, *et seq.*). It was again made during the hearing of the Motion to Suppress (Motion to Suppress, page 206, *et seq.*). The Motion was renewed upon the call

of the case for trial (Tr., page 4, *et seq.*). All of these Motions were overruled by the trial Court.

The government seized, pursuant to its Search Warrant approximately seven hundred thirty (730) individual items of property, all from the trailers in Greenville, South Carolina. These items consisted of alleged gambling paraphernalia, betting slips, betting information, allied matter and an electronically recorded magnetic tape. This tape contained about one (1) hour of recorded conversation, allegedly between the defendants Porter and Spears and a large number of other persons, none of whom were identified. Also on this tape, was an alleged telephone call to Birmingham, Alabama. The destination of the call being shown on the tape by a series of dial tones or "beeps".

From an abundance of caution and in an attempt to be prepared for trial, Spears and Porter, in June of 1969, served upon the government, a notice that they wanted to inspect, examine and copy all of the items seized in Greenville, South Carolina. No action was taken on this Motion until October 7, 1969, being the date of the Arraignment of the defendants. The defendants were advised, at that time, that trial would begin in the November, 1969 term of Court. A hearing was held on November 5, 1969, on the Motion to Examine and Inspect. On that date, the Court Ordered an inspection of the seized items and set a hearing on a previously served Motion to Suppress for 11:00 o'clock A. M., November 10, 1969. At the time of the hearing on the Motion to Suppress, the defense attorneys called to the Court's attention, the fact that insufficient time was being allowed for the examination, inspection and analysis of the seized items. A copy of the tape recording was given the defendants during the hearing on the Motion to Suppress on November 10, 1969.

Beginning on page three (3) of the hearing on the Motion to Suppress, counsel for Porter and Spears set

forth, in detail their requests for sufficient time to properly prepare a defense by examination of these seized items. It was brought to the attention of the Court that the greatest analytical laboratory in the world, to wit: the F. B. I. Laboratory, had taken from April 14, 1969 to May 2, 1969, a total of eighteen (18) days to examine and analyze the tape recording alone. The defendants, without such resources were being compelled to make such an examination in seven (7) days since the trial of the matter was set for November 17, 1969. The Court again refused the continuance.

This Motion was renewed again in great detail at the beginning of the trial on November 17, 1969 (Tr., page 4, *et seq.*). It was called to the Court's attention that insufficient time was being allowed for a proper analysis of the tape recording. This was substantiated by a letter from Communications Technical Sales, Inc., of Columbia, South Carolina, to the effect that he would need approximately two (2) weeks to analyze, in detail, the tape recording. This letter itself is not listed in the items marked as exhibits, but is set forth in the transcript at pages five (5) and six (6). In addition to the insufficient time needed to examine and analyze, the defendants were not permitted sufficient time to make any proper inspection and examination. Counsel for Porter set forth in the hearing on the Motion to Suppress beginning at page six (6), the time problems involved. It was Ordered, on November 5, 1969, that the government make available for inspection the huge volume of seized items. During the morning period of the hearing on November 5, 1969, the trial Court directed the government to permit inspection of the seized items. Counsel for the defendants returned to the Court House at 2:30 p. m., on that same date and 2:45 p. m., the F. B. I. Agents showed up and allowed defendants' counsel to look through the seized items. A total of forty-five (45) minutes were allowed to inspect a complete table of documents and evi-

dence. At 3:30 p. m., defense counsel were all called into the Judge's office and for twenty-five (25) minutes, a conference was held. At 4:00 o'clock p. m., Court reconvened and the hearing continued until 6:20 p. m., when Court was recessed. The Court had previously told the government to make the seized items available in Columbia, South Carolina, for inspection by defense counsel. On the following day, both attorneys for Porter and Spears were required to leave Columbia, South Carolina, to appear before the Fourth Circuit Court of Appeals in Richmond, Virginia. Both counsel returned to Columbia, South Carolina at midnight Friday, November 7, 1969. On November 8, 1969 (Saturday morning), counsel for Porter and Spears called the F. B. I. Office in Columbia, South Carolina, and were told that there was nobody available to allow inspection of any documents. The hearing on the Motion to Suppress was set for the morning of November 10, 1969, and counsel for Porter and Spears were required to leave Columbia early that morning in order to attend Court in Greenville, South Carolina. At that time, counsel for Porter and Spears had had approximately two (2) hours available time to inspect over seven hundred (700) different items. The defendants were then advised that a continuance would not be granted and that the trial of the matter would begin the following Monday, November 17, 1969. Trial was begun on that date and, again, the Motion to Continue renewed in great detail. The Court, for the final time, overruled the Motion to Continue and required all defendants to proceed to trial.

It is undoubtedly true that a Motion for a Continuance is addressed to the discretion of the Court. The defendants do not quarrel with this, but maintains that the Trial Court erred in not granting a reasonable time within which the defendants Porter and Spears could properly examine, interpret and analyze the seized tape recording. A Motion

for Continuance is a matter of discretion and will not be reviewed unless there is a clear showing that such discretion has been abused in that a manifest injustice has resulted from the refusing to continue. *Issacs v. U. S.*, 159 U. S. 487, 16 S. Ct. 51.

The major purpose of pretrial discovery of scientific reports is to prevent surprise at the trial and to give the defense sufficient time to retain its own experts to evaluate the government's reports, to make independent tests and examine, if so advised, and to prepare for cross examination of the government's expert witnesses. *Moore's Federal Practice*, Volume 8, Section 16-05 (3).

An interesting case in which the dicta clearly indicates the need for a continuance is *U. S. v. Tripiano*, 365 Fed. (2d) 416. In this case the negotiations for the sale of counterfeit stamps were secretly recorded on tape. During the trial, the prosecution gave the tape to the defense counsel and used the tape to examine and impeach witnesses. The tape was unintelligible in part. In this matter, the Trial Court held that the government had fully disclosed its complete record of what the witnesses had said by the introduction of the tape. All witnesses and persons whose voices were supposedly recorded were present in the court. The tapes were not less unintelligible to the defense as to the prosecution. The Court held that since the tapes themselves would not be admissible to prove the truth of any statements thus recorded and the witnesses whose conversations were recorded were available, it is doubtful that the defense could have derived any benefit from a clarification of the recording when they asked for a continuance.

What the Court is clearly saying in the *Tripiano* case is the exact position of the defendants in the instant case. The tape should not have been allowed into evidence and if it was, the defendants were denied their right to use the tape on cross examination of the government's witnesses

by the refusal of the Trial Court to grant the defendants ample opportunity, or at least a reasonable time, to analyze the tape. The Court will note from the transcript of the tape, that the court reporter could not understand the words on several occasions and, in lieu of the actual words, used the phrase "unintelligible". It is the position of the defendants Porter and Spears that there was a manifest abuse of the discretion of the court in refusing to allow a reasonable time within which to analyze and examine the tape which had been Ordered made available to the defendants. The making of the tape available to the defendants was, in fact, an empty gesture when they were denied an opportunity to evaluate the evidence.

II. The Trial Court erred in refusing to suppress the electronic tape recording.

It is the position of the defendants Porter and Spears that the Trial Court erred in refusing to suppress the use, in evidence, of the electronically recorded magnetic tape. The recording (Exhibit T-7) was seized by F. B. I. agents during the search in Greenville, South Carolina. The search was conducted in two (2) trailers and the tape found in one (1) of the trailers belonging to the defendant Spears. Reference to the Search Warrant (Exhibit T-4) will show that there was no mention of an electronically recorded tape, or an electronic recording device listed in those items for which a search was authorized, although the F. B. I. agent admitted that they knew of the existence of the tape prior to the securing of the Search Warrant (Tr., 592-595). Rule 41 of the *Rules of Criminal Procedure* (Sections C & E) is, as follows:

> (c) Issuance and Contents. A warrant shall issue only on affidavit shown to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that

grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the grounds that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds

for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

What the government was actually attempting to do, and did do in this matter, was not to seize the fruits or instrumentalities of a crime, but were attempting in the matter of the seizure of the tape to uncover tangible evidence of the crime. In a well documented commentary on this aspect of the law, *Barron on Federal Practice and Procedure,* Volume 4, Section 2403, makes the following statement:

> Thus is preserved an ancient but salutary paradox of the law. A search warrant may issue for the search and seizure of the fruits of instrumentalities of crime but not merely to uncover tangible evidence of the crime. Evidentiary matter is not the subject of a valid search and seizure unless it is the fruit or instrumentality of the offense. A search incidental to arrest cannot become a general exploration for evidence and in this respect cannot grant broader privileges than a search warrant. It is a truism that the most damaging and convincing evidence of crime is that produced from the defendant himself. The realistic purpose of a search is to get the evidence. Law enforcement officers are usually little concerned with the fruits and instrumentalities of crime except as these will convict the possessor of his misdeeds. But all officers must be aware that a search for evidence, as such, is a violation of constitutional provisions against compulsory self-incrimination as well as against unreasonable searches.

Cases dealing directly with this point and bearing out the position set forth above are *U. S. v. Rabinowitz,* 70 S. Ct. 430, and *U. S. v. Lord,* 184 Fed. Supp. 923.

It was the contention of the government that the tape itself was proof of an existing, past series of communications and could not, by any stretch of the imagination, be

used in the future for any illegal activity. The only conclusion that can be drawn is that the tape and the conversations on the tape, were purely evidence of past acts. There was, in fact, no substantial proof of when the acts themselves occurred.

III. The Trial Court erred in failing to suppress all evidence and testimony secured by the Government subsequent to February 7, 1969.

It is the contention of the defendants Porter and Spears that all of the governments case and the evidence secured, were a direct and actual result of illegally secured violation of the Fourth (4th) Amendment rights of Spears.

The first actual evidence of any conspiracy, and connection between the South Carolina and Alabama ends of these three (original four) defendants was a telephone call, overheard by an F. B. I. agent outside of a public telephone booth in Greenville, South Carolina (see Search Warrant T-4). The indictment alleges that on February 7, 1969, Spears was overheard making and receiving betting information from a public phone booth in a drugstore in Greenville and tied this call in by long-distance toll tickets to Fuller's telephone in Birmingham (Hearing Exhibit 5).

The pertinent testimony is contained in the Hearing on Motions to Produce, pages 9 and 10; Motion to Suppress, pages 49, 71, 81 and 85. Trial transcript pages 97 *et seq.*, 112 and 262. Photographs of the booth were introduced (Defendants Trial Exhibits A, B and C) and were identified by F. B. I. Agent Oyler (Tr., 262). The actual conversation was overheard by Agent McNamara (Tr., 97). The door to the booth was closed and Spears was admittedly engaged in a private conversation unaware of being overheard or observed. He was discussing gambling, and there was never any Order permitting the taking of

such a conversation (Tr., 113). The agent stood next to the booth and used his ear to eavesdrop (Motion to Suppress, Page 87).

The spirit of the recent decisions concerning eavesdropping must be considered along with the primary law stated in these decisions. The Omnibus Crime Control Act of 1968 contains the following:

Title III

Section 801

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

Section 2510. Definitions

(2) 'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation:

Section 2511.

(2) (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Section 2515. Prohibition of use as evidence of intercepted wire or oral communications.

"Whenever any wire or oral communication has been intercepted no part of the contents of such com-

munication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2518

(9) The contents of any intercepted wire or oral communication, or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

The cases bearing upon this doctrine of law are many and varied, but the gist of all of the cases is that an invasion of the privacy of the individual is the controlling factor. In *Katz v. U. S.*, 88 S. Ct. 507, the Court held:

> What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under 4th Amendment.
>
> A person in a phone booth may rely upon protection of 4th Amendment and is entitled to assume that words he utters into mouthpiece will not be broadcast to the world.
>
> Government's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied while

using the telephone booth and thus constituted a "search and seizure" within the 4th Amendment and the fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance.

In *U. S. v. Jones*, 292 Fed. Supp. 1001, the District Court considered the identical measures. The Court held:

> Fourth Amendment governs not only seizure of tangible items, but extends as well to recording of oral statements, overheard without any technical trespass under local property law. U. S. C. A. Const. Amend. 4.
>
> 2. Searches and Seizures
>
> Fourth Amendment protects people, not places, and is designated to preserve privacy against the "uninvited ear" of governmental intrusion. U. S. C. A. Const. Amend. 4.
>
> 3. Criminal Law
>
> Governmental interceptions of private conversations without prior judicial control are *per se* inadmissible in evidence in a federal court and must be suppressed where timely motions are filed. U. S. C. A. Const. Amend. 4.
>
> 4. Searches and Seizures
>
> Any distinction which might be drawn between consensual monitoring and third-party monitoring has no constitutional significance as far as the Fourth Amendment privacy concept is concerned. U. S. C. A. Const. Amend. 4.

An extremely strong discussion of the law is contained in *Wong Sun v. U. S.*, 371 U. S. 471, 83 S. Ct. 407:

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U. S. 505, 5 L. Ed. (2d) 734, 81 S. Ct. 679, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the

more traditional seizure of "papers and effects". Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States* (CAI NH), 227 F. (2d) 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less than the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 73 App. DC 85, 115 F. (2d) 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U. S. 214, 100 L. Ed. 233, 76 S. Ct. 292; or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U. S. 206, 4 L. Ed. (2d) 1669, 80 S. Ct. 1437, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.

If the evidence was illegally obtained and obtained in violation of the constitutional rights of the defendant Spears (4 Amendment), then such evidence and all evidence derived therefrom would be totally inadmissible and should have been suppressed. In *U. S. v. Schipani*, 289 Fed. Supp. 43, the Court held:

> (2) If the evidence is discovered as a result of both legal and illegal leads, it is inadmissible. It does not matter that the legal lead would itself probably have sufficed to uncover the evidence. As the Court of Appeals for this circuit declared, it is not sufficient for the government to show that "in the normal course of events it might have discovered the questioned evidence without an illegal search":
>
> "A showing that the government had sufficient independent information available so that in the

normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities not possibilities". *United States v. Paroutian,* 299 F. (2d) 486.

See also Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 624-30 (1968) ("The logic of the 'inevitable discovery' . . . collides with the fundamental purpose of the exclusionary rule"): Note, Fruit of the Poisonous Tree Doctrine—A plea for Relevant Criteria, 115 U. of Pa. L. Rev. 1136, 1143 (1967) (defendant need not show that police "would not have discovered the challenged evidence 'but for' the illegal police conduct").

IV. Was the electronic tape recording admissible in evidence?

Exhibit T-7, the magnetic tape recording of supposedly telephone conversations of the defendants Porter and Spears were admitted into evidence on the trial of the case over strenuous objection of all defendants. These objections went primarily to the failure of the government to authenticate the recording of an actual reproduction of events which supposedly took place during the times covered by the Indictment. Many objections were made on the failure of the government to introduce the machine upon which the tape was made or produce the method or time of the making of the tape. The Trial Judge admitted the tape into evidence and allowed the highly prejudicial tape to be played to the jury upon the mere fact that the tape

had been discovered in the trailer of Spears. The defendants will admit that electronic recordings and tape recordings have been held to be properly admissible where there is other testimony introduced by the government supporting the authenticity of the tape as a correct reproduction of the events supposedly depicted or reproduced on the tape. There must be a foundation laid, establishing the following:

(a) That the recording was made on an instrument or a device capable of recording sounds or the sounds depicted on the tape;

(b) The recording device was operated by a competent operator;

(c) The correctness or authenticity of the recorded conversations is established by some person who heard the actual conversations.

(d) No alteration, additions, changes or deletions have been made.

(e) The preservation of the recording is shown;

(f) The statements were made freely and voluntarily and finally there is an identification of the speakers on the tape.

See *U. S. v. McKeever,* 169 Fed. Supp. 426, *Wright v. U. S.* 353, Fed. (2d) 362, *Chapman v. U. S.,* 271 Fed. (2d) 593. All of these cases and all of the cases discovered by us where there has been an admission into evidence of a sound recording there has been testimony that the recording is accurate, that it is of an event that occurred and the speakers are identified and testimony as to the facts surrounding the making of the tape. None of these qualifications have been utilized in the government's introduction of Exhibit T-7 into evidence. Since the government laid no foundation for the admissibility of this Exhibit (T-7) the tape was not admissible. It should have been excluded from evidence.

V. If the evidence was insufficient to sustain a conviction of the Appellant Fuller under the counts of the Indictment, the counts of the Indictment would fail as to the Appellants Porter and Spears.

It is the position of Porter and Spears that there was a total lack of proof of any conspiracy between the defendant Fuller and the two (2) defendants in South Carolina. The defendant Fuller, in his Brief filed with the United States Court of Appeals for the Fourth Circuit, has well and amply argued the question of his involvement as a co-conspirator and it would seem useless to further argue the same point. Porter and Spears fully adopt Fuller's argument on this point and contends that the conspiracy would fall as to them since there would be no other defendant in any state other than South Carolina and no proof of conspiracy to use betting or wagering information in interstate commerce or in violation of the pertinent sections of the U. S. Code. In effect, Porter and Spears are one person for purposes of arguing this point and two persons are necessary to form a conspiracy as charged in the Indictment and acquittal of one person requires the acquittal of the other person in the absence of evidence implicatting any other person, *U. S. v. Gordon,* 242 Fed. (2d) 122.

VI. The Court erred in admitting, over the objection of the Appellants, the testimony of expert witness Cross and the Court further erred in refusing to allow the introduction of a previous statement made by such witness, contradicting his testimony on the witness stand.

One of the most damaging witnesses against the defendant was the F. B. I. expert Cross. This man was the one who had analyzed all of the items of evidence seized in the raids pursuant to the Search Warrants and sent to the F. B. I. Laboratory in Washington, D. C. He was allowed

to testify as an expert witness on interpreting various items of evidence, one of which was Government's Exhibit T-51. These were various slips of papers with figures on the papers and Cross was allowed to interpret the figures and give his opinion of the meaning of the notations. These notations and figures had no connection with gambling or conspiracy until interpreted as such by Cross (Tr., 778, *et seq.*) He had previously prepared a report which followed his lengthy analysis in the F. B. I. Laboratory and in this report, he expressed the opinion and so stated, that the absence of certain information "precludes identification of the submitted specimens as gambling paraphernalia" (Tr., 800-809). Counsel for the defendant Fuller, supported by the defendants Porter and Spears, offered this analysis report into evidence as defendant's Exhibit F (Tr., 809). Even though the Trial Judge admitted the document into evidence, he refused to allow the document to be submitted or given to the jury (Tr., 809-810). This was an extremely important point because the jury could have well concluded from the examination of the written report that Cross' entire testimony could have been without value. This point has been well considered in a number of District Court decisions and was passed upon in *Gordon v. U. S.*, 344 U. S. 414. The identical question was persented in *Gordon* as is present in the instant case. The Supreme Court said:

> "The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance."

VII. The Court erred in calling to the jury's attention in the instruction at the conclusion of the trial, the fact that the Appellants had chosen not to testify.

It is an elementary right of a defendant not to testify should he see fit not to do so and the Courts may not comment on the failure of a defendant to testify. It is the position of the defendants that the Court unduly commented upon this fact to the detriment of the defendants in overemphasizing the fact that the defendant did not testify. The overemphasis thus proved detrimental to the defendants and deprived them of the full benefit of the constitutional right not to testify. On two occasions during the trial, the Judge commented to the jury on this matter and directly called the attention of the jury to the failure of the defendants to testify. One of these occasions was during the trial itself (Tr., 864) and the other one, which was more lengthy, was during the charge (Tr., 901). See *Griffin v. California,* 380 U. S. 609.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

KALE R. ALEXANDER,
DAVID A. FEDOR,
Attorneys for Appellants.

Of Counsel:

BETTY M. SLOAN.

APPENDIX

ORDER OF THE U. S. COURT OF APPEALS

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 14,205

UNITED STATES OF AMERICA, APPELLEE,
versus
ARTHUR FULLER, APPELLANT

No. 14,357

UNITED STATES OF AMERICA, APPELLEE,
versus
THOMAS LYNN PORTER, APPELLANT

No. 14,358

UNITED STATES OF AMERICA, APPELLEE,
versus
LARRY SPEARS, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT GREENVILLE
CHARLES E. SIMONS, JR., DISTRICT JUDGE

(Argued December 11, 1970 Decided April 30, 1971)

Before SOBELOFF, WINTER and CRAVEN, Circuit Judges.

Kale R. Alexander (David A. Fedor on brief) for Appellants in Nos. 14,357 and 14,358; William H. Mills for Appellant in No. 14,205; and Joseph O. Rogers, Jr., United States Attorney (Thomas F. Batson and D. Gene Rickenbaker, Assistant United States Attorneys, on brief), for Appellee.

CRAVEN, Circuit Judge:

Appellants, Arthur Fuller, Thomas Lynn Porter, and Larry Spears, were indicted along with a fourth codefendant, Clyde Troulias, on two counts of violations of federal statutes prohibiting the use of interstate telephone facilities for gambling activities and a third count of conspiring together to commit the crimes charged in the substantive counts. Porter and Spears are residents of Greenville, South Carolina, and Fuller and Troulias are residents of Birmingham, Alabama. F. B. I. investigation in both locations produced evidence tending to show that bookmaking operations on sporting events were being operated by Porter and Spears out of two trailers they occupied in Greenville and by Fuller and Troulias out of Fuller's home in Birmingham. There was also indication that gambling information or bets were exchanged by the four defendants via long distance telephone calls made from pay telephones in Greenville to Fuller's residence and Troulias' sister's residence in Birmingham. Simultaneous searches were made of the trailers in Greenville and Fuller's home pursuant to search warrants. After a lengthy trial, the jury acquitted Troulias and found the appellants guilty on all three counts.

I

Appellant Fuller argues that there was an insufficient showing of probable cause for the issuance of the warrant for the search of his home in Birmingham.[1] The government contends that the written affidavit submitted by an F. B. I. agent, coupled with oral testimony given by the agent under oath before the United States Commissioner who issued the warrant, was sufficient. Fuller argues that Rule 41(c), Fed. R. Crim. P., requires probable cause to be based solely on a written affidavit and that supplemental oral testimony is proscribed. We need not decide whether oral testimony can be used to supplement a written affidavit under Rule 41(c) since we conclude that the written affidavit alone was sufficient.

[1] The validity of the Greenville search warrant is not attacked on appeal.

The affidavit contained the following statements:[2]

(1) An unidentified informant, who had provided reliable information in the past, told the affiant, F. B. I. Agent Osborne, that "Clyde Troulias was the biggest bookie in the Birmingham area"; that he was taking bets on sporting events; and that he was working with Arthur Fuller in his booking operation.

(2) Agent Osborne telephoned Clyde Troulias at his sister's residence and was told that he could be reached at Arthur Fuller's residence. Agent Osborne telephoned Arthur Fuller's residence and Clyde Troulias answered the phone.

(3) Agent Osborne personally observed Clyde Troulias and Arthur Fuller in the company of known gamblers. F. B. I. records showed Clyde Troulias was convicted of a gambling offense in 1960 and arrested for bookmaking in 1967 after a raid by state officers on the residence of his sister.

(4) Agent Osborne was informed by F. B. I. Agent Haas, who was conducting a gambling investigation in Greenville, South Carolina, that an unidentified informant, who had given Agent Haas reliable information in the past, had observed Thomas Lynn Porter and Larry Spears taking bets and giving out line information at two trailers occupied by them in Greenville. The informant also told Agent Haas that Spears and Porter were receiving line information from Birmingham.

(5) Agent Haas and other F. B. I. agents observed Porter and Spears in five different telephone booths in Greenville at times when four calls were placed to the residence of Clyde Troulias' sister, Annie Lou Troulias, in Birmingham and five calls were placed to the residence of Arthur Fuller in Birmingham. The four calls to the Troulias' residence were made in November and December of 1968. The five calls to the Fuller residence were made in January and February of 1969. A survey of subpoenaed telephone

[2] The affidavit is recited in full in the appendix.

records for these same five telephone booths showed 259 calls from the booths in Greenville to one of two phones at the Birmingham residence of Troulias' sister between August 1968 and January 20, 1969. The records also showed 75 calls from the five booths to the Birmingham residence of Arthur Fuller between January 18, 1969, and February 22, 1969.

A magistrate issuing a search warrant may rely on the hearsay information provided by an unidentified informant if "a substantial basis for crediting the hearsay is presented." *Jones v. United States*, 362 U. S. 257, 269 (1960). In order to show a substantial basis for crediting the hearsay, the affidavit must pass the two-pronged test of *Aguilar v. Texas*, 378 U. S. 108 (1964). The magistrate must be informed of (1) the underlying circumstances on which the affiant concludes that the informant is credible and (2) the underlying circumstances on which the informant based his conclusion that the person whose residence is to be searched is engaged in criminal activity. If the informer's tip is found inadequate under *Aguilar*, the magistrate may yet find probable cause to believe the tip if it can "fairly be said that the tip . . . when corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration." *Spinelli v. United States*, 393 U. S. 410, 415 (1969).

The affidavit in this case contains information supplied by two informants, one in Greenville and one in Birmingham. The Birmingham informant's tip is not supported by the circumstances on which the informant based his conclusion that "Clyde Troulias was the biggest bookie in the Birmingham area" and thus does not meet the *Aguilar* tests. It must, therefore, be disregarded. The Greenville informant's tip is another matter.

The credibility of the Greenville informant is supported by a statement that he had previously given Agent Haas reliable information. We think that a magistrate is entitled to infer that an informant who has provided information in the past which has proved to be accurate will probably continue to give accurate information in the

future. We also think that the report of information from one named F. B. I. agent to another agent who is the affiant, when both are working together on a joint investigation, is inherently credible. See *United States v. Ventresca*, 380 U. S. 102, 111 (1965). The Greenville informant's statement that Porter and Spears were taking bets and giving out line information was based on his personal observation, and, thus, this portion of his information meets both of the *Aguilar* tests. The informant's statement that Porter and Spears were receiving their line information from Birmingham is not reported as being based on his personal observation. However, we feel that the statement regarding the large volume of phone calls made from five phone booths in Greenville to the Fuller and Troulias residences plus the statement that Porter on some occasions and Spears on others were seen in the phone booths when nine of these calls were placed supports an inference that the calls were made by Porter and Spears to Troulias and Fuller in connection with Porter and Spears' gambling activities. All of the calls before January 18 were made to the residence of Annie Lou Troulias and all of the calls after January 20 were made to the residence of Arthur Fuller. This supports Agent Osborne's conclusion in the affidavit that the Birmingham end of the gambling operation was transferred from the Troulias residence to the Fuller residence about January 19, 1969. During the period of January 18, 1969, to February 22, 1969, the calls from the five Greenville phone booths to the Fuller residence in Birmingham averaged more than two a day, which suggests something other than the casual conversation of friends.

Only probability and not a *prima facie* showing of criminal activity is required to sustain a search warrant. *Beck v. Ohio*, 379 U. S. 89 (1964). A reviewing court is not to substitute its judgment as to probable cause, but only to determine whether there was a substantial basis for the magistrate's determination of probable cause. *Jones v. United States*, 362 U. S. 257, 271 (1960). We conclude that, based on the written affidavit alone, there was a substantial basis for the magistrate to conclude that Porter and

Spears were probably engaged in gambling activity, that they were probably assisted or joined in this activity by Clyde Troulias and Arthur Fuller in Birmingham, that the link between Greenville and Birmingham was probably made by long distance phone calls, that the locus of the Birmingham end of the operation was probably shifted from the Troulias residence to the Fuller residence, and that therefore gambling paraphernalia would probably be located at the Fuller residence.

II

During the search of Fuller's residence, two F. B. I. agents answered two telephones located in the bedroom. The agents answered the phones for 25 minutes. The callers identified themselves by number and asked for the "line".[3] The agents, who had been prepared to do so, supplied the callers with the current "line" information. Testimony of the conversations was introduced into evidence.

Fuller argues that this was a seizure of the conversations and was outside the scope of the search warrant relying on *Marron v. United States*, 275 U. S. 192 (1927), and *Stanford v. Texas*, 379 U. S. 476 (1965).

Marron was a prohibition case involving the execution of a search warrant which authorized searching for and seizing "intoxicating liquors and articles for their manufacture." 275 U. S. at 193. When the prohibition agents raided the place, they found a speak-easy, not a still. In addition to discovering some liquor, they seized ledger books and bills. The Court said the ledger books and bills were outside of the scope of the warrant, but were admissible as material seized incident to a lawful arrest.

But that is not this case. The search warrant in *Marron* was very specific and the questioned items seized were wholly different in nature and kind from the items listed. In this case, the warrant authorized searching for and seizing "bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports infor-

[3] We are told the phrase "line" refers to the predicted point spread between teams in athletic contests.

mation papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States Currency. . . ." The description is necessarily general and clearly contemplates that material relating to gambling activity but not precisely described might be seized. The intent of the generalized description is clearly to permit the seizure of any items directly related to the appellants' booking operation. The telephone calls answered by the agents were clearly a part of appellants' booking operation and, therefore, we think within the scope of the general language of the warrant.[4]

Nor do we think that a warrant which is limited to the seizure of items which are directly related to a booking operation to be the kind of general search prohibited by the Fourth Amendment. This is not a case where "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude [because] the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford v. Texas,* 379 U. S. 476, 485 (1965). The agents executing the warrant in this case were empowered to seize only a limited class of things, that which was related to a bookmaking operation. "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods." *Nuckols v. United States,* 99 F. (2d) 353, 355 (D. C. Cir. 1938).

III

On February 7, 1969, during the surveillance of Porter and Spears in Greenville, F. B. I. Agent McNamara overheard a portion of a call Spears was making from a telephone booth. The door of the booth was closed, or nearly so, and Spears' back was to the glass door so that he was unaware of the listening agent. The agent was standing very near the booth, or at most two to four feet from it, and overheard the conversation unassisted by any amplifying or electronic surveillance equipment. The over-

[4] For recent interpretations of the *Marron* limitation see *Gurleski v. United States,* 405 F. (2d) 253 (5th Cir. 1968); *Anglin v. Maryland,* .... F. (2d) .... (4th Cir. 1970).

heard conversation was not introduced into evidence, nor was it used in the affidavit to obtain the search warrants. Porter and Spears argue that this was an unconstitutional seizure of the conversation within the rationale of *Katz v. United States,* 389 U. S. 347 (1967), and that all evidence and testimony developed subsequent to February 7, 1969, must be excluded as a tainted product of the unlawful seizure. *Wong Sun v. United States,* 371 U. S. 471 (1963).

The rationale of *Katz* is that the Fourth Amendment protects as private that which a person reasonably expects will be private. We think a person is not entitled to expect that his conversation in a telephone booth will not be heard and repeated if he speaks loudly enough to be overheard by the human ear (unassisted electronically) of someone standing outside the booth. "The risk of being overheard by an eavesdropped or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of society. It is the kind of risk we necessarily assume whenever we speak." *Lopez v. United Statse,* 373 U. S. 427, 465 (1963) (dissenting opinion), quoted with approval in *Hoffa v. United States,* 385 U. S. 293, 303 (1966).

Although offered the opportunity to secure the testimony of the agent who actually listened, appellants did not do so and failed to establish the pertinent facts. We do not even know whether the telephone booth door was entirely closed. Whether the listening F. B. I. agent was four feet from the panel wall of the booth or had his ear pressed tightly against it is not clear. Doubtless there is a risk of eavesdropping against which the law affords no protection, but whether pressing the ear up against the partition of a telephone booth goes beyond permissible surveillance and is so similar to electronic bugging as to be an invasion of privacy protected by the Fourth Amendment is not presented on this record. Compare *Ponce v. Craven,* 409 F. (2d) 621 (9th Cir. 1969); *United States v. Llanes,* 398 F. (2d) 880 (2d Cir. 1968).

As for the eavesdropped conversation, the record indicates that the listening agent learned only what he already knew, *i. e.,* that Spears was engaged in a gambling

operation. The listening agent could not ascertain from the conversation to whom Spears was talking, nor even where the person was located. Since the overheard conversation did not reveal to the agents anything they did not already know, nor lead them to any evidence helpful to prove what they already knew, the doctrine of *Wong Sun* is clearly inapplicable, and if we assume a violation of *Katz*, there is no tainted material.

IV

The appellants raise a number of other issues on appeal which require little discussion. Porter and Spears argue that the district court's denial of their motion for a continuance to allow them to examine the material seized from the Greenville trailers, and especially to allow them to have an expert examine a tape recording discovered in one of the trailers of phone conversations of Porter and Spears giving line information and accepting wagers, was error. The appellants have now had time to examine the evidence seized including an opportunity to test the tape recording. Absent a claim that they have discovered something that would materially further their defense, there is no showing that manifest injustice has resulted from an abuse of the district court's discretion in refusing to grant a continuance. See *Isaacs v. United States*, 159 U. S. 487 (1895).

All three of the appellants objected to the admission of the tape recording seized by the F. B. I. from one of the Greenville trailers. Porter and Spears argue that it was outside the scope of the search warrant and could not have been the subject of a search warrant because it was mere evidence rather than fruits or instrumentalities of the crime. Fuller argues that the tape was made prior to the date of the first alleged overt act in the conspiracy and thus should have been excluded as hearsay as to him. All three argue that no proper foundation was laid as to the conditions of its making and preservation in the same condition from recording to trial.

The language of the description of items to be seized in the Greenville warrant is identical to that in the Bir-

mingham warrant. See Section *II* above. The tape recording was apparently made as a record of bets and is clearly within the description "bookmaking records and wagering paraphernalia." The distinction between mere evidence and fruits or instrumentalities was abolished in *Warden v. Hayden,* 387 U. S. 294 (1967). The rule limiting the admissibility of hearsay statements of codefendants that Fuller relies on deals with situations where one conspirator has made a statement as to what another conspirator has done or said. The tape recording is not of that kind. There was no claim made that Fuller was involved in any of the activities mentioned on the tape so that the hearsay rule is not relevant. The tape was admissible as proof that Porter and Spears were engaged in gambling activity, a necessary element of Fuller's conspiracy conviction. Appellants' claim that a foundation had to be laid as to the making and preservation of the tape is based on cases where the party making the tape introduces it into evidence. Here the tape was found in Porter and Spears' possession and their voices are identified on it. The F. B. I. agents through whose hands the tape passed testified that it had not been altered and its condition at the time of the trial was identical to that at the time of seizure. This we think was sufficient foundation for its accuracy.

All three appellants argue that the district court's instruction regarding their right not to testify focused the jury's attention on their failure to testify thus depriving them of the right. Absent a request not to give the instruction and absent an objection to it once it was given, the instruction was appropriate. *United States v. Smith,* 392 F. (2d) 302 (4th Cir. 1968).

Fuller argues that the evidence was insufficient to sustain his conviction and that the failure to grant his motion for a separate trial was an abuse of the district court's discretion. After examining the record, we conclude that there was sufficient evidence for the jury to find every element beyond a reasonable doubt and that the refusal of the motion for severance was not an abuse of discretion.

For the reasons stated, the judgment of the district court is

AFFIRMED.

AFFIDAVIT

Before Mildred F. Sprague, U. S. Commissioner for the Northern District of Alabama, Birmingham, Alabama, the undersigned, being duly sworn, deposes and states: That affiant is a Special Agent of the Federal Bureau of Investigation and has continuously held that position for the past twenty-five years. Affiant has been assigned to the investigation of gambling matters within the jurisdiction of the Federal Bureau of Investigation in the Birmingham area for the past eleven years. During that time, Affiant has been involved in more than 200 separate and distinct gambling investigations and as a result of this experience, Affiant has had the opportunity to examine the records commonly used by bookmakers.

That since July, 1968, confidential informants have spoken to Affiant personally about gambling and bookmaking activities of CLYDE TROULIAS and ARTHUR FULLER and Affiant was in a position to judge the reliability of those informants. On other occasions, confidential informants have provided information about TROULIAS and FULLER to Special Agents of the Federal Bureau of Investigation in South Carolina, and at that time Affiant personally reviewed the information submitted by the South Carolina F. B. I. and their informants, and from it made a personal judgment as to the informants' past reliability.

That Affiant, based on facts set forth in this affidavit, now has reason to believe, and does believe, that on the premises further described herein known as:

1133 Sherwood Forest Drive, Birmingham, Alabama, located in the Northern District of Alabama, there has been and are now concealed certain property, to wit: bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks,

money orders and United States Currency, which property has and is being used in violation of Sections 371, 1084, and 1052 of Title 18, United States Code.

That Affiant, based on his experience in gambling matters, knows that bookmakers who operate interstate by telephone are known to use and have in their possession the paraphernalia described above.

That the premises are further described as:

1133 Sherwood Forest Drive,
Birmingham, Alabama,
a two-story brick residence.

The facts upon which this affidavit is based are as follows:

I. (a) A confidential informant known to me to have furnished reliable information in the past stated "CLYDE TROULIAS was the biggest bookie in the Birmingham area" and that he bets principally on football but also takes bets on basketball and baseball during their respective seasons.

(b) The same confidential informant further stated on or about the same date that CLYDE TROULIAS is presently working with ARTHUR FULLER in the booking operation in the Birmingham area.

(c) One example of the reliable information which this informant has supplied in the past was informing Affiant of known gamblers being in the Birmingham area during a specific weekend. The Affiant checked this information and personally observed the known gamblers previously noted by the informant.

II. (a) In February, 1969, Affiant had occasion to personally telephone Birmingham telephone number 836-5429, which is the residence of ARTHUR FULLER, located at 1133 Sherwood Forest Drive, Birmingham, Alabama, and CLYDE TROULIAS answered the phone.

(b) On February 27, 1969, Affiant personally telephoned number 322-6192 the telephone number of the sister of CLYDE TROULIAS, and a female answered the telephone, and when Affiant asked to speak to CLYDE TROULIAS, without giving his identity, he was informed that

TROULIAS was not there, but if desired he could call ARTHUR FULLER.

(c) For the past two years, Affiant has personally observed CLYDE TROULIAS in company with other known gamblers in the Birmingham area. He has also personally observed ARTHUR FULLER during the same period of time in the company of known gamblers in the Birmingham area.

(d) F. B. I. Identification Record No. 418 273 A for CLYDE TROULIAS indicates a gambling conviction in 1960; and a bookmaking arrest in 1967 which arrest occurred after a State raid on the residence of his sister, ANNIE LOU TROULIAS, 2405-36th Avenue North, Birmingham, Alabama.

III. Attached herein is an affidavit of WILLIAM P. HAAS concerning gambling activities in Charleston and Greenville, South Carolina.

In November, 1968, the Affiant received information that an interstate gambling investigation being conducted by WILLIAM P. HAAS, a Special Agent of the Federal Bureau of Investigation, had disclosed that known gamblers in the Greenville, South Carolina, area had been contacting individuals in the Birmingham, Alabama, area. Special Agent Haas has been with the F. B. I. continuously for the past six years and has been assigned to the investigation of gambling matters within the jurisdiction of the Federal Bureau of Investigation for approximately three years. Special Agent Haas furnished Affiant with the following information:

(a) In November, 1968, a confidential informant known to Special Agent WILLIAM P. HAAS to have furnished reliable information in the past, stated that THOMAS LYNN PORTER and LARRY SPEARS were operating a bookmaking establishment in two trailers located on the outskirts of Greenville, South Carolina.

(b) The same confidential informant, who had personally been in the aforementioned trailers, had witnessed THOMAS LYNN PORTER and LARRY SPEARS accepting wagers and giving out line information.

(c) In February, 1969, the same confidential informant stated that PORTER and SPEARS were receiving their line information from Birmingham, Alabama.

(d) Physical surveillance of LARRY SPEARS and THOMAS LYNN PORTER in Greenville, South Carolina, during November, 1968, through and including February 13, 1969, by WILLIAM HAAS and other Special Agents of the Federal Bureau of Investigation placed LARRY SPEARS and THOMAS LYNN PORTER in different telephone booths when the following telephone calls were made:

Date	*Telephone Booth Number*	*Number Called*
November 7, 1968	277-9813	322-6192, Birmingham, Ala.
November 26, 1968	277-9900	322-6192, Birmingham, Ala.
November 26, 1968	277-9874	322-6192, Birmingham, Ala.
December 10, 1968	277-9900	322-6192, Birmingham, Ala.
January 29, 1969	277-9900	836-3500, Birmingham, Ala.
February 6, 1969	277-9727	836-5429, Birmingham, Ala.
February 7, 1969	277-9902	836-3500, Birmingham, Ala.
February 7, 1969	277-9900	836-5429, Birmingham, Ala.
February 13, 1969	277-9927	836-5429, Birmingham, Ala.

IV. A survey of the subpoenaed telephone records of Southern Bell Telephone and Telegraph Company of Greenville, South Carolina, disclosed the following calls made from the pay stations mentioned in III (d) above:

Telephone Number	*Call To*	*Subscriber*	*Number of Calls*	*Date*
277-9727	323-3933	TROULIAS	37	8-18-68—1-19-69
277-9727	322-6192	TROULIAS	65	9-29-68—1-19-69
277-9727	836-3500	FULLER	10	1-18-69—2-21-69
277-9727	836-5429	FULLER	7	1-22-69—2-21-69
277-9874	323-3933	TROULIAS	2	12-21-68—1-11-69
277-9874	322-6192	TROULIAS	10	11-23-68—1-11-69
277-9874	836-5429	FULLER	5	1-25-69—2-19-69
277-9874	836-3500	FULLER	1	1-26-69—
277-9902	323-3933	TROULIAS	10	8-22-68—1-10-69
277-9902	322-6192	TROULIAS	25	8-23-68—1-20-69
277-9902	836-5429	FULLER	5	1-20-69—2-22-69
277-9902	836-3500	FULLER	12	1-20-69—2-22-69
277-9900	323-3933	TROULIAS	23	11- 3-68—1-18-69
277-9900	322-6192	TROULIAS	33	11- 2-68—1-19-69
277-9900	836-5429	FULLER	4	1-16-69—2-15-69

Telephone Number	*Call To*	*Subscriber*	*Number of Calls*	*Date*
277-9900	836-3500	FULLER	10	1-20-69—2-15-69
277-9813	323-3933	TROULIAS	11	11-16-68—1-15-69
277-9813	322-6192	TROULIAS	43	11- 6-68—1-18-69
277-9813	836-5429	FULLER	10	1-20-69—2-15-69
277-9813	836-3500	FULLER	11	1-20-69—2-19-69

V. Telephone records of South Central Bell Telephone Company, Birmingham, Alabama, reflect that the telephone numbers 322-6192 and 323-3933 are listed to ANNIE LOU TROULIAS, sister of CLYDE TROULIAS, at 2405-36th Avenue North, Birmingham, Alabama; and 836-5429 is subscribed to an ARTHUR U. FULLER, 1133 Sherwood Forest Drive, Birmingham, Alabama, and 836-3500 is listed to WANDA FULLER, wife of ARTHUR FULLER, 1133 Sherwood Forest Drive, Birmingham, Alabama.

VI. The telephone records, shown in paragraph IV (above), indicate there were approximately 259 calls to the residence of CLYDE TROULIAS' sister between August, 1968, through and including January 20, 1969, and seventy-five (75) calls to ARTHUR FULLER's residence from January 18, 1969, through and including February 22, 1969.

VII. In February, 1969, the Affiant through investigative efforts and toll records from Greenville, South Carolina, showing a change of calls leading him to believe that CLYDE TROULIAS had moved his gambling operation from 2405 36th Avenue North, Birmingham, Alabama, the residence of his sister, Mrs. ANNIE LOU TROULIAS, to 1133 Sherwood Forest Drive, Birmingham, Alabama, the residence of ARTHUR FULLER. The move took place around January 19, 1969.

VIII. An analysis of the Telephone Company toll records obtained pursuant to a Grand Jury subpoena from the Southern Bell Telephone and Telegraph Company of Greenville, South Carolina, reveals generally a pattern of telephonic contacts which can be interpreted as indicative of a gambling enterprise. Affiant, based on his experience investigating interstate bookmaking, knows it is common practice for bookmakers not to use their own telephone

number when making interstate calls, and it is common practice to use pay phones not listed to them personally.

IX. Records of Greenville, South Carolina, Police Department indicate THOMAS LYNN PORTER has been arrested in 1959, 1960 and 1961 for selling lottery tickets. In 1967, PORTER was convicted of a gambling offense which he is presently appealing to the United States Supreme Court.

Therefore, Affiant has reason to believe, that the divers bookmaking records and wagering paraphernalia are being used by CLYDE TROULIAS and ARTHUR FULLER, and other persons unknown to Affiant, all of whom are engaged in the bookmaking business, all of whom transmit bets and wagers and information assisting in the placing of bets and wagers in interstate commerce, in violation of Section 1084, Title 18, United States Code, all of whom use facilities in interstate commerce to carry on a business enterprise involving gambling violations contrary to the laws of the State of Alabama in violation of Section 1952, Title 18, United States Code, and all of whom have conspired among themselves and with others to violate Sections 1084 and 1952 in violation of Section 371 of Title 18, United States Code.

Further Affiant saith not.